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CASES CITED

TEXTBOOKS

STATUTES

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 493

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

REUEL D. ROBBINS, JR., AND SADIE M. ROBBINS, AS Executors of the Last Will and Testament of R. D. Robbins, Etc.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 16–42) is reported in 5 Fed. (2d) 690.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered against the United States April 29, 1925. (R. 42.) The action was brought against the United States to recover a tax claimed to have been illegally assessed.

The jurisdiction of the District Court rests on the Tucker Act, Act of March 3, 1887, chap. 359, 24 Stat. 505; Judicial Code, Section 24, Paragraph 20, Act of March 3, 1911, chap. 231, 36 Stat. 1087, 1093. The jurisdiction of the Supreme Court upon writ of error is based on Section 9 of the Act of March 3, 1887, chap. 359, 24 Stat. 505, 507. *Greenport Basin & Construction Co.* v. *United States*, 260 U. S. 512.

STATEMENT

THE QUESTION PRESENTED IS WHETHER UNDER THE COMMUNITY PROPERTY SYSTEM IN CALIFORNIA THE WIFE HAS SUCH A PROPRIETARY INTEREST IN THE COMMUNITY INCOME AS TO ENTITLE HER TO RETURN AS HER OWN FOR FEDERAL INCOME TAX PURPOSES ONE-HALF OF THE COMMUNITY INCOME, OR WHETHER UNDER THE CALIFORNIA SYSTEM THE HUSBAND DURING THE CONTINUANCE OF THE COMMUNITY IS THE REAL PROPRIETOR OF THE COMMUNITY PROPERTY AND MUST RETURN THE COMMUNITY INCOME AS HIS OWN.

In this case it appears that Reuel D. Robbins and Sadie M. Robbins were married in 1871 (R. 14) and continued to be husband and wife until the husband's death September 7, 1919 (R. 13, 14), and during all of that period were residents of California (R. 14). A large amount of real and personal property was accumulated subsequent to the marriage, *all of which was acquired before the year 1917*. (Finding VIII, R. 15.) The so-called community income for the year 1918 consisted, in part, of moneys earned by the husband during that year as salaries, fees and commissions, and, in part, of

rents and issues of the community real and personal property. (R. 15.)

Robbins was required by the Commissioner of Internal Revenue to return all of the community income for 1918 in his return and to pay an income tax thereon. If he had been permitted to return only one-half of the community income as his own his tax would have been $4,291.43. Being required to return the entire community property as his own, the tax paid was $11,079.46. The difference, $6,788.03, was paid under protest and after the death of Robbins his executors made a claim for refund, on the failure to allow which this suit was brought. (R. 15, 16.)

SPECIFICATION OF ERRORS

1. The District Court erred in holding that under the California community property laws applicable to the community property involved in this case one-half of the community income for 1918 was not income of the husband under the Federal Revenue Act of 1918.

2. The District Court erred in holding that under the California community property system husband and wife were entitled to file separate income-tax returns for Federal taxes, each for one-half of the community income for 1918.

3. The District Court erred in rendering judgment against the United States. (R. 44.)

ARGUMENT

SUMMARY

I. Preliminary discussion. The proper method of approaching the question is to ascertain the nature of the wife's interest in community income in California, by finding what rights of ownership she may exercise over it under California law.

II. The decisions of the California courts as to the extent of the wife's interest in the community income and her want of power to exercise proprietary rights over it are binding on the Federal courts.

III. The statutes bearing on the case.

IV. A general review of the decisions of the California courts discloses that under the so-called community system prevailing in that State and applicable to the community property here involved the wife during the existence of the community had no estate, title, or ownership in the community income, and the husband had absolute ownership and power of disposition of the income, restricted only by a prohibition against gifts.

V. Disregarding descriptive phrases and terminology, the California statutes and decisions applicable to the property here involved have never yielded to the wife any semblance of a proprietary interest or ownership in the community property prior to dissolution of the community.

1. The husband has complete and absolute dominion, possession, and control of the community property.

2. The entire community property is subject to the husband's debts contracted before and after marriage.

3. The husband may expend all of the community property and income as he pleases,

wastefully and for his own pleasure, without infringing the wife's rights.

4. The only restrictions on the exercise of absolute ownership by the husband are a prohibition against gifts without the wife's consent (which has been held to vest no interest in her) and a prohibition (enacted in 1917 and not applicable to the property involved here) requiring the wife to join in a conveyance of community real estate.

5. During the community the wife has no right to expend or have expended for her benefit any part of the community property. The obligation of the husband to provide support and necessaries is a personal one arising out of the marital relation, having no relation to the community property, and is a charge upon him and his separate as well as the community estate, and not based on the theory that the wife owns an interest in the community.

6. During the community the wife may not maintain any action respecting the community property, and she is not a necessary or even a proper party to a suit involving the community property.

7. On dissolution of the community by her death her inchoate interest disappears. Absolute ownership remains in the husband. She leaves no estate in the community subject to administration, nor is it liable for her debts or expenses of administration, nor does the husband take by succession or descent.

8. If she survives her husband, the wife succeeds to one-half of whatever may then remain of the community property, subject to payment of his debts, and expenses of administration. The entire community property forms part of his estate and is administered as such. The wife takes as heir, and her succession is subject to imposition of inheritance taxes. The Act of

1917, relieving the interest of the surviving wife from inheritance tax is merely an exemption and does not alter the nature or extent of the wife's interest.

9. The statutory restriction on gifts by the husband has been held to vest no interest or ownership in the wife, and no case has yet held that she may, before dissolution of the community, sue to set aside a gift made without her consent.

10. On dissolution of the community by divorce, the community property is distributed by the divorce court, and in the absence of adultery or cruel treatment is divided equally. If such misconduct has occurred, the court distributes the community property according to what appears to be just and proper.

11. The community property is not liable for debts of the wife contracted after marriage. It is liable for her debts contracted dum sola, not because of her ownership in the community property, but because her husband became liable for her debts on marriage, and only his separate estate is exempted by statute. The freedom of the community property from liability for the wife's debts would prevent the United States from satisfying a claim against the wife for income taxes out of the community property. The United States could not lawfully compel the wife to pay an income tax on any share of the community income because it is not hers, but is the income and property of her husband.

VI. The case of Blum v. Wardell, 270 Fed. 309 and 276 Fed. 226, may be distinguished, because it dealt with the nature of the wife's interest in the community property after dissolution of the community and not with her interest in the income during the community. If not distinguished, it should be disapproved, because it misconceived the nature of the Act of 1917, exempt-

ing the wife's succession from State inheritance tax, and treated it as changing the wife's interest, although it merely exempted it. It also mistakenly applied the Act of 1917, requiring the wife to join in a conveyance of real estate, to property acquired prior to 1917.

VII. The amendments to the California laws affecting the wife's interest in the community property adopted in 1917 and later are not pertinent here, because all the property here involved was acquired prior to 1917, and under California decisions these amendments do not affect property acquired before their passage.

VIII. Opinions of the Attorneys General and miscellaneous authorities.

1. The opinions of the Attorneys General hold that the community income in California is taxable to the husband alone.

2. Congressional inaction on the questions here involved is without particular significance.

3. In the Philippine Islands the community income is held to be the income of the husband for Federal income tax purposes.

4. The decisions of this Court in Warburton v. White, 176 U. S. 484, Garrozi v. Dastas, 204 U. S. 64, and Arnett v. Reade, 220 U. S. 311, do not deal with the California system, and the California court has held that Arnett v. Reade does not describe the community system prevailing there.

5. Opinions of text writers, including law writers from California law schools, completely refute the claim that in California the wife has any ownership in the community property and the claim that the system in California is like that in all the other States where a system of "community" property prevails.

IX. A comparison of the nature and extent of the wife's interest in the community property in Califor-

I

Preliminary discussion of the questions involved

On September 10, 1920, the Attorney General gave an opinion to the Secretary of the Treasury that under the community system in Texas the wife was the proprietor of one-half of the community income and entitled to make a separate income return thereof under the Revenue Act of 1918. (32 Ops. A. G. 298.) On February 26, 1921, a second opinion of the Attorney General was given, holding that under the community-property systems in the States of Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada the wife had such an interest in the community income as to entitle her to return one-half of it in a separate income-tax return. In that opinion, pointing out differences between the California system and the community system in other States, the Attorney General held that under the California system the community income belonged to the husband and must be returned by him. (32 Ops. A. G. 435.)

In December, 1920, the United States District Court for the Northern District of California, in the case of *Blum* v. *Wardell,* 270 Fed. 309, held that under the California system on the prior death of the husband the wife did not succeed to one-half of the community property as heir and that the one-half of the community property to which the wife succeeded on the death of the husband was not subject to the Federal estate tax. This decision was affirmed by the Circuit Court of Appeals for the Ninth Circuit October 24, 1921 (*Wardell* v. *Blum,* 276 Fed. 226).

This Court denied a petition for certiorari in the case of *Wardell* v. *Blum,* March 6, 1922, 258 U. S. 617. On April 7, 1922, the Solicitor General made a motion in the Supreme Court to revoke the order denying the petition for certiorari in *Wardell* v. *Blum,* which motion remained pending for some time, and in October, 1923, was withdrawn by the Solicitor General.

On March 8, 1924, following what had occurred in *Wardell* v. *Blum,* the Attorney General rendered another opinion (34 Ops. A. G. 376), modifying the opinion of February 26, 1921, and holding that under the community property system in California the interest to which the wife succeeded on the death of her husband was not inherited and was not subject to the Federal estate tax.

On May 27, 1924, the Attorney General recalled for further consideration the opinion of March 8, 1924, but on October 9, 1924 (34 Ops. A. G. 395),

reaffirmed the opinion of March 8, 1924, to the effect that no Federal estate tax should be charged upon the share to which the wife succeeded on the death of the husband. This last opinion seems to have been induced by the practical situation resulting from the decision in *Wardell* v. *Blum* and the refusal of the Supreme Court to issue a writ of certiorari. It expressly refrained from modifying the previous opinion that in California community income is taxable to the husband alone.

In the present case the method of approach adopted by the lower court is to start with the assumption that the opinion of the Attorney General as to the right of the wife to make a separate return of one-half of the community income in Washington, Arizona, Idaho, New Mexico, Louisiana, Nevada, and Texas was right. An effort is then made to show that the systems in the States referred to do not differ substantially from the California system, and the conclusion is then reached that if the Attorney General were right in the cases of Texas and the other States classified together they must be wrong as to California. We submit that this method of dealing with the problem is ineffective. We might, with equal propriety, assume that the Attorney General was right in holding that the community income in California belonged to the husband, and conclude—if there be no substantial differences between the California system and the others—that the conclusions reached in Texas, Louisiana and other States were

wrong. *There are radical differences between the community systems in various States. The notion that there is any community property system common to the States carved from the former Spanish dominions must be discarded at the outset.*

To attempt a comparison between the varying statutes and decisions of all these States is confusing, involves an investigation of intolerable length, and produces no convincing or satisfactory results.

An investigation of the original Spanish source of the system is inconclusive. California may or may not have adhered to the Spanish conception. The courts of California may have misunderstood the Spanish system. The question here relates to the system effective in California as defined by its statutes and the decisions of its courts.

Much effort has been expended in the various opinions, decisions, and briefs on this subject in discussing attempts by the courts of California to define in general terms the nature of the wife's interest in the community property, and whether it is an "inchoate" interest or a "vested" interest, or "a mere expectancy." We will discuss this matter of terminology to some extent, *but the real question is not one of terminology but of the intrinsic nature of the wife's interest in the community estate in California; and that is to be answered not by use of descriptive phrases, but by ascertaining from the statutes and decisions of California just what the wife may do or has a right to have done with the community income.* By ascer-

taining whether she has any control over it, whether she may spend one-half or has a right to have it spent for her, whether her creditors may resort to it in satisfaction of their claims, whether her husband may spend it as he pleases, whether his separate creditors may satisfy their claims out of any part of the community income as well as out of his separate property, whether on the wife's prior death any part of the community estate forms part of her estate subject to administration or subject to her debts, and whether if the husband dies first the entire community property is administered as part of his estate subject to his debts and expenses of administration, we will be doing more than scratch the surface and will obtain a basis for a conclusion as to whether a wife in California has a real proprietorship or ownership in the community income entitling her to return one-half of it as her own, or entitling the United States, if it chooses, to compel her to pay a tax on one-half of the community income.

We propose to first refer to the California statutes, to then make a general review of the California decisions, and to follow this with a more critical examination of California cases, in order to ascertain just what proprietary rights with respect to community property the wife is allowed to exercise in California.

This will be followed by a discussion of *Blum* v. *Wardell,* pointing out that that decision was based on a mistaken conception of the nature and legal

effect of the California statute passed in 1917 exempting the wife's interest from a State inheritance tax, and after some discussion of the opinions of the Attorneys General on this subject, and miscellaneous authorities, a comparison will be made, which we think will be illuminating, between the interest of the California wife in the community income and the interest of a wife in the separate income of her husband in some States where the community property system does not exist. It should be noted that the property here involved, from which the income of 1918 was derived, was acquired prior to 1917, and the nature of the wife's interest is not affected by 1917 legislation.

II

The construction of the California statutes by the courts of that State is binding on the Federal courts

While it is true that in determining the incidence of a Federal tax the Federal courts are entitled to form their own judgment of the legal nature of the subject of the tax, it is equally true that in determining the nature of an interest created by State law it is necessary for the Federal courts to accept the decisions of the State courts construing the statutes creating the interest and to determine from the decisions of the State courts the characteristics of the interest from which its intrinsic nature must be determined. While the adjectives or terminology used by the courts of California to describe the wife's interest in the

community estate are not controlling on the Federal courts, the decisions of the State courts holding what rights of a proprietary nature the wife may exercise with respect to the community estate are binding on the Federal courts. *Moffitt* v. *Kelly*, 218 U. S. 400, 406; *Choctaw, O. & G. Railroad Co.* v. *Harrison*, 235 U. S. 292; *Hines Yellow Pine Trustees* v. *Martin*, 268 U. S. 458; *Warburton* v. *White*, 176 U. S. 484, 496.

III

The statutes bearing on this case

The only pertinent provision of the Revenue Act of 1918 is the provision that the tax shall be levied "upon the net income of every individual." Sections 210, 211, Part II, Act of February 24, 1919, chap. 18, 40 Stat. 1057, 1062.

We are thus relegated to the California statutes and decisions to ascertain whether the community income is the income of the husband or whether half of it is the income of the wife. The California statutes provide (Civil Code, 1915):

> SEC. 162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.
>
> SEC. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or de-

scent, with the rents, issues, and profits thereof, is his separate property.

SEC. 164. All other property acquired after marriage by either husband or wife, or both, * * * is community property; * * *.

These three sections, enacted March 21, 1872, are based upon Statutes 1850, page 254, sections 1 and 2.

SEC. 687. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either.

This section was enacted March 21, 1872.

The first community property law of 1850 (Stats. 1850, p. 254, sec. 9) provided as follows:

> The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate.

In construing this provision the court held that the husband could dispose by will of only one-half of the community property if the wife survived him.

In 1872, by the Civil Code of that year, Section 172, this was amended to read as follows:

> The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate.

In 1891 (Stats. 1891, p. 425) the following proviso was added:

> *Provided, however,* That he can not make a gift of such community property or convey the same without a valuable consideration, unless the wife, in writing, consent thereto.

In 1901 (Stats. 1901, p. 598) a second proviso was added, as follows:

> *And provided also,* That no sale, conveyance or incumbrance of the furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife.

In 1917 (Stats. 1917, p. 829) this provision was separated into two parts by the Legislature, one referring to the community personal property, which was not changed but read as follows:

> SEC. 172. Management of community personal property. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; ***provided, however,*** **that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the**

clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

At the same time, in 1917, there was added a new section, 172a, which dealt with the community real property, as follows:

SEC. 172a. Management of community real property. The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage, or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate.

The law regarding the distribution of community property on the death of husband and wife in effect for many years prior to 1923 provides for the distribution of the community property on death of wife as follows

SEC. 1401. Distribution of the common property on death of wife. Upon the death

> of the wife, the entire community property, *without administration,* belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband. (Civil Code Cal. 1915.) (Italics ours.)

And for the distribution of the community property on the death of the husband as follows:

> SEC. 1402. Distribution of common property on death of husband. Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. *In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.* (Civil Code Cal. 1915.) (Italics ours.)

In 1923 a further change was made in the statutes relating to the succession upon the death of husband or wife, but any amendment affecting the nature of the wife's interest since 1918 is not relevant to this case. There are some other statutes dealing with the mutual rights and obligations of husband and wife arising from the marital relation which will be mentioned later.

IV

General review of the decisions of the California courts

The appellate courts of California from the decision in *Panaud* v. *Jones,* 1 Cal. 488 (in 1851), to *Chance* v. *Kobsted,* 226 Pac. 632 (in 1924), have consistently and constantly maintained that the husband is the owner of the community property during the life of the community. While acts of the legislature have imposed certain restrictions on some of his acts with regard to the property, the California courts have never wavered in their view that the husband is the owner, and the later decisions have been just as positive in their statements as it was possible to make them.

The case of *Panaud* v. *Jones,* 1 Cal. 488, arose under the Spanish law, but the court says that the State statute of 1850 changed that law in only one particular, and that is regarding debts. The court gives the following as the law with regard to the ownership of community property during the life of the community (p. 515):

"The wife," says Febrero (1 Feb. Mej. 225, sec. 19), "is clothed with the revocable and *feigned* dominion and possession of one-half of the property acquired by her and her husband during the marriage; but after his death it is transferred to her effectively and irrevocably, so that by his decease she is constituted the absolute owner in property and possession of the half which he left." But, he observes in the next section, "The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the *Gananciales*, since, even during the marriage, he has in effect the irrevocable dominion, and he may administer, exchange, and, although they be neither *castrenses* nor *quasi castrenses* acquired by him, may sell and alienate them at his pleasure, provided there exist no intention to defraud the wife. For this reason, the husband living and the marriage continuing, the wife can not say that she has any *Gananciales* nor interfere with the husband's free disposition thereof under pretext that the law concedes the half to her, for this concession is intended for the cases expressed and none other."

In *Van Maren* v. *Johnson* (15 Cal. 308, 311) the court, by Chief Justice Field, made the clear and positive statement of the law in California which has been the foundation for all later decisions and has been cited many times and never disaffirmed:

…n these parallel lines of
…ecisions & after many yrs

> Yet the common property is not beyond the reach of the husband's creditors existing at the date of the marriage, and the reason is obvious; the title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor. (*Guice* v. *Lawrence*, 2 La. Ann. 226.)

This was reaffirmed in *Packard* v. *Arellanes*, 17 Cal. 525, 538, where it was said:

> The title to such property rests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true the wife is a member of the community and entitled to an equal share of the acquests and gains; but so long as the community exists her interest is a mere expectancy and possesses none of the attributes of an *estate*, either at law or in equity. This was held in *Van Maren* v. *Johnson*, before referred to, where the interest of the wife was compared to that which an heir may possess in the property of his ancestor. The same doctrine prevails in Louisiana and appears to be an established principle of the civil and Spanish law.

In *Directors of Fallbrook Irrigation District* v. *Abila*, 106 Cal. 355, 361, it was said:

> That the interest which a wife has in community property does not constitute her an owner of land within the meaning of the Wright act is beyond doubt. During the

> continuance of the community it is a very impalpable interest and difficult of definition. It has sometimes been defined as "a mere expectancy, like the interest which an heir may possess in the property of his ancestor" (*Van Maren* v. *Johnson*, 15 Cal. 312; *Greiner* v. *Greiner*, 58 Cal. 119; *People* v. *Swalm*, 80 Cal. 49, 13 Am. St. Rep. 96); although it is, no doubt, more tangible than the mere expectancy of a general heir. In Platt on Property Rights of Married Women it is said: "The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by law as the sole owner." But, however difficult it may be to define or describe the peculiar relation which a married woman bears to community property during the existence of the coverture, it is clear that she can not be properly said to *own* it in any legal sense or in any other sense.

In the first *Spreckels* case, decided in 1897 (116 Cal. 339), husband and wife sued to recover community property which he had given to the defendant without consideration and without the consent of his wife. By an amendment made to the Civil Code in 1891 it was provided that the husband could not make a gift of community property without the written consent of the wife. For the purposes of this case it was assumed that the community property had been acquired prior to the

enactment of this statute. The court held that the husband had such rights to community property that the 1891 law could not constitutionally affect his power to dispose of community property acquired before the passage of that act; and it also held that the wife could not be joined as plaintiff in an action to recover community property, saying (p. 349):

> It has been held for near half a century that she is not a proper party to such actions.

The Court said (pp. 342–347):

> Prior to the amendments of 1891 the code vested in the husband, with reference to the community property, all the elements of ownership, and in the wife none.
>
> * * * * *
>
> As to all the world except the wife, there was, prior to this amendment, no distinction between the community estate and the separate estate of the husband. If suit were brought upon a liability incurred in a business, the profits of which would be community property, and judgment recovered, execution could be levied upon the separate estate of the husband, and the debt entirely satisfied therefrom. His separate estate, during the entire marriage, is liable to be taken for community debts, and of course furnishes a credit in aid of community business. If the community loses, the loss may fall upon his separate estate, but his separate estate can not profit by the success of the community.

The separate property of the wife is exempt from all these liabilities, but, on the other hand, the community property is liable for debts incurred by the husband in the management of his separate estate.

Now, all these differences point to the fact that the husband is the absolute owner of the community property. Therefore it is that his liabilities incurred in the management of the separate estate can be enforced against the common property, while those of the wife can not be. And, therefore, she, under certain circumstances, can accumulate property which shall not belong to the community. If it went to the community it would belong to the husband, and under the circumstances it is not thought just that he should have it. He needs no corresponding privilege, because the community property is his as absolutely as is his separate estate. So he can not convert it into his separate estate, and if the property belonged to the community, and the husband had only an agency, perhaps he could not give it to his wife.

Now, then, we have this state of the case: The statute provides that the husband and wife may hold property as community property. (Civ. Code, sec. 161.) It defines what shall constitute community property. It defines ownership (Civ. Code, sec. 654), and then gives to the husband complete legal ownership of the community property (Civ. Code, sec. 172), and confers upon the wife no element of ownership whatever.

Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in *Godey* v. *Godey,* 39 Cal. 157. In that case it is said that while no other technical term so well defines the wife's interest as the phrase "a mere expectancy * * * it is at the same time, * * * so vested in her that [the] husband can not deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it."

The testamentary power is not an essential incident to property, and depriving the husband of such power with reference to the community estate did not take from him any right of property. It was competent for the legislature to deny to the husband the right to dispose of his separate estate by will, and to provide that upon his death all should go to his widow subject to the payment of his debts. Should the legislature now so provide, it would not deprive the husband of any vested right to property, or give the wife an interest in his estate during his life. If the property did not belong to the husband, there would be no occasion for a law limiting his testamentary power with reference thereto. The original statute, which practically adopted the Mexican system as to *gananciales,* was held to constitute such a

limitation. (*Beard* v. *Knox,* 5 Cal. 256, 63 Am. Dec. 125.) That gave the wife a nominal estate during the marriage which became an actual estate upon its termination.

If the husband can not make a valid transfer of the property for the purpose of depriving the wife of it, that does not show a vested right in her. This is explained in the very case quoted as authority in *Godey* v. *Godey, supra.* * * * So we see a mere expectancy, without any vested property right at the time the fraud was committed, is sufficient to enable the person who has the expectancy to maintain the action after his right has become vested.

The husband's ownership of one-half of the community estate is in a sense conditional. It may terminate upon the happening of a possible event. Until then he is, however, absolute owner as defined in the code. (Civ. Code, secs. 678–80.)

The marital community was not organized for the purpose of accumulating property, and the husband owes no duty to the community, or to the wife either, to labor or accumulate money, or to save or practice economy to that end. He owes his wife and children suitable maintenance, and if he has sufficient income from his separate estate for that purpose he need not engage in business, or so live that there can be community property. If he earns more than is sufficient for such maintenance he violates no legal obligation if he spends the surplus in extravagance or gives it away. The com-

munity property may be lost in visionary schemes or in mere whims. Within the law he may live his life, although the community estate is dissipated. Of course, I am not now speaking of his moral obligations.

We derived the system of community estate from the Mexican law which prevailed here before the acquisition of the territory. The system was unknown to the common law, and it has no better name for the interest of the wife during the marriage than "a mere expectancy." The Mexican jurists spoke of it as a feigned and fictitious ownership or as merely nominal, and it is contrasted with the ownership of the husband. That is called the actual or true ownership. In *Panaud* v. *Jones,* 1 Cal. 488, it is said: "The wife," says Febrero (Febrero Mejicano, sec. 19, p. 225), "is clothed with the revocable and *feigned* dominion and possession of one-half of the property acquired by her and her husband during the marriage; but, after his death, it is transferred to her effectively and irrevocably * * *. The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the *gananciales,* since even during the marriage he has in effect the irrevocable dominion," etc.

In *Van Maren* v. *Johnson,* 15 Cal. 308, it is said that the estate of the common property is in the husband, and he may dispose of it as he can of his separate estate—the interest of the wife being a mere expectancy. *Guice* v. *Lawrence,* 2 La. Ann. 226, is cited

as authority. In *Packard* v. *Arellanes,* 17 Cal. 525, that case is again cited as authority, in which it is said that during the life of the husband the wife can not say she has *gananciales*—that is, community property—but the husband during marriage is "*real y verdadero dueno de todos, y tiene en el effecto su dominio irrevocable.*" Where, too, the interest of the wife was said to be revocable and fictitious.

In Escriche, under *Bienes Gananciales,* it is said that the husband owns the community property both nominally and in fact—*en habito y en acto,* while the wife's ownership is only nominal—*en habito*—becoming an actual estate upon the dissolution of the marriage.

In Ballinger on Community Property, section 35, the Mexican law is stated as above, the wife had only a feigned or fictitious estate which ripened into a legal estate upon the termination of the marriage, and he adds—referring to the state of things under the former statute of this state which provided that upon the death of the wife prior to the death of the husband one-half of the community property should go to her heirs—that since the statute failed to provide that upon the death of the wife one-half should go to her estate, her intangible interest did not ripen into a legal estate. Accordingly, it was held in *Packard* v. *Arellanes* (17 Cal. 525), that under such circumstances the interest of the wife could not be administered upon, and that her heirs did not acquire the

estate by inheritance from her upon her death before her husband, but took as persons designated by the statute. Speaking of the wife's interest, it is there said: "Such interest constitutes neither a legal nor an equitable estate, and there is, therefore, nothing in it for a court of probate to act upon. If, under the statute, the title of the husband, upon the death of the wife, is divested as to any portion of the property, such title passes directly to the descendants of the wife, and they take it subject to the liability of the property to be absorbed in the payment of debts."

As the law stood prior to the amendment of 1891, I doubt if a happier phrase could have been devised to express the interest of the wife in the community than that used by Judge Field in *Van Maren* v. *Johnson, supra,* "a mere expectancy." It may be said to be a right—not to property, but, as against the community—to take one-half of the residue after payment of debts in case the marriage be dissolved during her life. A somewhat similar state of things exists in France under the code, and it has been there said that the wife is not "*proprie socia, sed speratur fore.* She has *une simple esperance* to share in such property as may be found at the dissolution of the community undisposed of by the husband." (1 Burges' Colonial Law, 368.)

In *Spreckels* v. *Spreckels* (1916) 172 Cal. 775, three children of Claus A. Spreckels sued two of

their brothers for restitution of property received by those two brothers from their father so far as it exceeded one-half of the community property of their father and mother. The father had given to those two brothers community property worth $25,000,000, leaving remaining in his possession and ownership at the time of his death other property not exceeding $10,000,000 in value. The mother did not, in her lifetime, consent to the making of any of these gifts, either in writing or otherwise.

The statute as amended in 1891 provided:

> The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community property or convey the same without a valuable consideration unless the wife, in writing, consent thereto.

The mother survived the father. The court held that the gifts did not become void at his death, but were only voidable at her option. By her will she impliedly ratified the gifts. Therefore judgment for defendants was affirmed. In its opinion the court said (p. 780):

> Under the statute prior to the addition of of the first proviso in 1891, it was the established doctrine in this state that during the marriage the husband was the sole and ex-

clusive owner of all of the community property, and that the wife had no title thereto nor interest or estate therein other than a mere expectancy as heir if she survived him. [Citing many California cases.]

The limitation upon the husband's testamentary power contained in the code was not understood to vest in the wife, during the marriage, any interest or estate whatever in the community property, but merely to constitute a restriction upon the husband's power. If the husband undertook to dispose of all of the community property by will, giving the wife less than one-half thereof, such disposition was not absolutely void, but had the effect of putting her to her election whether to take under the statute or under the will. If she took the latter provision, the disposition in the will of the remaining portion of the property was thereby affirmed and made valid. (*Morrison* v. *Bowman*, 29 Cal. 346; *Estate of Stewart*, 74 Cal. 98, 104, 15 Pac. 445; *Estate of Smith*, 108 Cal. 119, 40 Pac. 1037; *Estate of Vogt*, 154 Cal. 509, 98 Pac. 265.) The testamentary disposition in such a case, therefore, was voidable but not absolutely void. If it had been void, in the extreme sense, the logical result would have been that a mere election by the wife would not transfer the remainder of her statutory half to the other beneficiaries under the will, but that a conveyance by her would be necessary. It has been always understood that her election is sufficient for

that purpose and that the will, in that event, operates to transfer the property. * * *

We have been able to find but two decisions of this court upon this subject involving community property which vested after the year 1891, namely, *Fulkerson* v. *Stiles,* 156 Cal. 704, 26 L. R. A. (N. S.) 181, 105 Pac. 966, and *Fanning* v. *Green,* 156 Cal. 281, 104 Pac. 308. In each of these cases the doctrine above stated, that the wife has no interest or estate in community property during the marriage relation, and that the husband is the absolute owner thereof, subject to the limitations upon his power of disposition, is reiterated.

We are satisfied that the proviso of 1891 does not render a gift of community property by the husband without the consent of the wife void as to him, nor confer upon him in his lifetime, or upon his personal representatives after his death, any right or power to revoke the gift or recover the property. There is nothing in the language to express the idea that the title does not, as before, remain wholly in him. *The provision is merely for a limitation upon his power to dispose of it.* He is bound by his own gift as fully as if it was of his separate estate. The demurrer was properly sustained so far as the executors of the will of Claus Spreckels are concerned.

Neither does the proviso purport to vest in the wife, during the marriage, any present interest or estate in the community property given away by the husband without her written consent. In view of the long-settled

> doctrine that the entire estate therein is in the husband during the marriage relation, a doctrine that had become a fixed and well-understood rule of property, it is not to be supposed that the legislature would have made a change of so radical a character without plain language to that effect. We do not find in the proviso such language, nor anything that can reasonably be so construed. If it confers upon her, during the marriage, any right respecting such gifts, it is nothing more than a right to revoke the gift and, if necessary, sue to recover the property, not as her separate estate, but to reinstate it as a part of the community property, with the title vested in the husband and subject to sale by him, as before. (Italics ours.)

In *Roberts* v. *Wehmeyer* (1923) 191 Cal. 601, the plaintiff (Elizabeth Roberts) and her husband bought land and built a house after the enactment of the 1917 amendment to the Civil Code, making payment from community funds which had been acquired before that amendment became effective. He sold the property to Wehmeyer. His wife did not join in the deed. Wehmeyer knew that Roberts was married. An interlocutory decree of divorce was granted to her and she was awarded, among other things, the real estate here involved. She brought action to have the conveyance annulled and was awarded judgment, which was reversed on appeal.

The Supreme Court held that as the property was bought with community personalty acquired

before the 1917 amendment became effective, the husband had the same rights as if the land and house were community personalty, and that the legislature could not change the vested rights of the husband in property theretofore acquired and he did not lose any vested rights by converting personality into realty. It said (p. 606, 611, 612, 614):

> It is claimed on behalf of respondent that although the courts of this jurisdiction have held that title to community property rests in the husband and that a wife's interest therein is a mere expectancy, she has in reality a vested interest in it, which she conveys by joining in the transfer or encumbrance. This, it is stated, has been recognized by the courts of all the other states having a community property system and by the Supreme Court of the United States [citations], and it is urged that this court has recognized in a wife many rights over community property which are inconsistent with the view that she has no vested interest in it. Thus, it is pointed out, a wife's rights in such property have been held to constitute a valuable consideration for an agreement or transfer (*Estate of Brix*, 181 Cal. 667, 186 Pac. 135), and on the dissolution of the community by divorce the wife's half of the community property immediately vests in her as tenant in common with her husband (*De Godey* v. *Godey*, 39 Cal. 158).
>
> It is also argued that as an interest in property may be either present or future

(Civ. Code, sec. 688), a future interest entitles the owner to possession of the propery at a future period (Civ. Code, sec. 690), and a future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the termination of the intermediate interest (Civ. Code, sec. 694), a wife has a vested future interest in the one-half of the community property which a husband can not dispose of by will and which goes to the wife upon the husband's death. This position is not maintainable, in view of the decision in *Estate of Burdick*, 112 Cal. 387, 44 Pac. 734, wherein it was held that the wife has but a possible interest in whatever community property remains upon a dissolution of the community otherwise than by her own death, which interest does not constitute an estate within the meaning of section 700 of the Civil Code.

This court has often considered the relative rights of a husband and wife in the community property. In *Spreckels* v. *Spreckels*, 172 Cal. 775, 158 Pac. 537, the conclusions reached in the various decisions are thus epitomized: "Under the statute prior to the addition of the first proviso in 1891 it was the established doctrine in this state that during the marriage the husband was the sole and exclusive owner of all the community property and that the wife had no title thereto, nor interest or estate therein,

other than a mere expectancy as heir, if she survived him [citing authorities].

"The limitation upon the husband's testamentary power contained in the code was not understood to vest in the wife, during the marriage, any interest or estate whatever in the community property, but merely to constitute a restriction upon the husband's power." It was further held in that case that the proviso added in 1891 (Stats. 1891, p. 425), imposing the limitation on a husband's right to make gifts of the community property, did not change this rule. These principles are thoroughly established in our laws and have been rigidly adhered to at least from the early case of *Van Maren* v. *Johnson,* 15 Cal. 308.

It is contended by respondent, however, that the whole system of community property in this state rests upon a misconception of the Spanish law embodied in *Van Maren* v. *Johnson, supra.*

* * * * *

It clearly appears from the foregoing that the early decisions of this court, wherein was laid down the rule that during the existence of the community title to the community property is vested in the husband, are not open to the criticism advanced. They rest upon sound authority and a proper interpretation of the Spanish law as incorporated in the statutes of this state through which the community property system was established. If anything to the contrary appears in such cases as *Beard* v. *Knox,* 5 Cal. 252, 63 Am.

Dec. 125, that case being authority for the proposition that the husband may not make testamentary disposition of the wife's half of the community property, it has been disapproved. (*Estate of Moffitt,* 153 Cal. 359, 360, 20 L. R. A. (N. S.) 207, 95 Pac. 653, 1025.) It can not be held to have been the law, as argued by respondent, that before the adoption of section 172a of the Civil Code, a wife had any vested interest in the community property before dissolution of the community.

The cases from various other community property states undoubtedly have held that the wife has an estate during coverture, but an examination of those decisions points wherein they are distinguishable from ours, and wherein, from the viewpoint of our decisions, they should not be followed.

* * * * *

In our opinion neither these authorities nor any other considerations would justify us in overturning a rule of property which has been settled law in this state for more than sixty years.

It thus appears that the husband is the owner of the community property; that except for such restrictions as the legislature may have authority to impose he has the unqualified right to dispose of it and that the wife has but a mere expectancy and not a title or interest which she would convey by joining in the deed. Under these circumstances, to provide that the husband must now obtain the consest of his wife to trans-

fer realty acquired at a time when no such limitation was imposed on his right of alienation would deprive him of a vested right. (*Spreckels* v. *Spreckels*, 116 Cal. 339, 58 Am. St. Rep. 170, 36 L. R. A. 497, 48 Pac. 228; *Clavo* v. *Clavo*, 10 Cal. App. 447, 102 Pac. 556.) It follows that section 172a can have no application to such a case, and hence does not govern the transfer in the case at bar.

In arriving at this conclusion we are not unmindful of the two decisions rendered in the case of *Blum* v. *Wardell*, one by the United States district court, 270 Fed. 309, and the other by the United States circuit court of appeals, 276 Fed. 226.

* * * * *

We need express no opinion of the decision of the United States district court for, as we have already held, section 172a has no application to the property involved in the case at bar.

We agree with the decision of the circuit court of appeals in so far as it is based on an interpretation of the Inheritance Tax Act of 1917 to the effect that the part of the community property passing to the wife should not be subject to such tax. But in so far as it relies on *Arnett* v. *Reade*, *supra*, as indicating that a wife has at all times had an interest or estate in the community property, we are constrained to disagree with it. [That case arose in New Mexico.] * * * The case is to be distinguished from the one at bar, for, as already indicated, in this ju-

risdiction a husband is held to have absolute ownership of the community.

From the passage of the State Inheritance Law of 1905 until the enactment of the statute in 1917, exempting the interest in the community estate to which the wife succeeded on the husband's death from inheritance taxes, the interest to which the wife succeeded was subject to an inheritance tax under the laws of California. *In re Burdick,* 112 Cal. 387; *in re Moffitt's Estate,* 153 Cal. 359; *Moffitt* v. *Kelly,* 218 U. S. 400; *Chambers* v. *Lamb,* 186 Cal. 261; *McDougald* v. *First Federal Trust Company,* 186 Cal. 243. In *Moffitt's Estate* it was said (p. 361):

> After painstaking investigation and review, and after the fullest deliberation, this court *In re Burdick* determined and held, as it declared in *Spreckels* v. *Spreckels,* that upon the death of the husband the wife takes one-half of the community property as heir. Every argument here advanced against that conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. No useful purpose can be subserved by a repetition of these arguments or of the answers to them. A reading of the opinions of this court in those cases will establish how thoroughly the questions were entered into, and what a complete disposition was made of them.

We are quite unable to understand the contention that there are two independent and conflicting lines of decisions in California on this subject. It is

true that loose language has been used in some of the cases in attempting to describe the wife's interest, but these differences are mere differences in terminology. *With respect to what the courts of California have actually held as to proprietary rights the wife may exercise over the community property there has never been any difference of opinion.*

In the case of *Beard* v. *Knox,* 5 Cal. 252, often cited as the origin of the line of authorities holding that the wife owns an interest in the community estate, the court decided only, in a case arising after the husband's death, that the widow succeeded to a half interest in the community estate free from testamentary disposition by her husband.

The quotation from Professor Pomeroy on page 75 of this brief is pertinent here.

In *Payne* v. *Payne,* 18 Cal. 291, and *Morrison* v. *Bowman,* 29 Cal. 337, the decision of the court was confined to the same proposition. There is language in these decisions attempting to describe the nature of the wife's interest during coverture as a joint interest, or a definite and certain interest, but it is entirely *obiter.*

A careful analysis of the alleged conflicting decisions will demonstrate the truth of our contention that in matters actually decided there is no conflict in the California decisions, and they have uniformly refused to allow the wife to exercise any proprietary interest of any nature prior to the dissolution of the community, and have uniformly

given to the husband the exercise of all rights of ownership.

In the case of *Taylor* v. *Taylor,* 192 Cal. 71, decided in 1923, and urged as the last of those cases sustaining the wife's proprietary interest during coverture, the court considered a claim by a divorced wife for a share of the community estate. It was dealing with her interest *after dissolution* of the community, where in the divorce proceedings no decree had been rendered dividing the community estate or disposing of it. It announced the law as it has always been.

The Supreme Court of California reviewed this whole subject in the case of *Roberts* v. *Wehmeyer,* 191 Cal. 601, a decision rendered in August, 1923, after the decisions in *Blum* v. *Wardell,* 270 Fed. 309 and 276 Fed. 226. It reaffirmed the conclusion that the wife during the existence of the community has no interest or estate in the community property. It considered the contention that Judge Field (afterwards an Associate Justice of this Court), in the case of *Van Maren* v. *Johnson,* 15 Cal. 308, had misunderstood the case of *Guice* v. *Lawrence,* 2 La. Ann. 226, and showed that Judge Field had not misunderstood the Louisiana Law, and it reviewed the Louisiana cases to date, showing that in that State the wife's interest during the existence of the community is inchoate.

It considered all amendments to the California statutes prior to 1917 and held that they did not

operate to give the wife any proprietary interest in the community property.

In *Roberts* v. *Wehmeyer,* the California court disagreed with the conclusions of the Federal courts in *Wardell* v. *Blum* as to the effect of the California decisions. It did say (*obiter*) that it agreed with the Circuit Court of Appeals in so far as "it is based on an interpretation of the Inheritance Tax Act of 1917 to the effect that the part of the community property passing to the wife should not be subject to such tax," but said (p. 614):

> But in so far as it relies on *Arnett* v. *Reade* as indicating that a wife has at all times had an interest or estate in the community property, we are constrained to disagree with it. * * * The case (*Arnett* v. *Reade*) is to be distinguished from the one at bar, for, as already indicated, in this jurisdiction a husband is held to have absolute ownership of the community.

In speaking of the alleged conflict in the California decisions, the court said (p. 611):

> *If anything to the contrary appears* in such cases as *Beard* v. *Knox,* 5 Cal. 252, 63 Am. Dec. 125, that case being authority for the proposition that the husband may not make testamentary disposition of the wife's half of the community property, *it has been disapproved. Estate of Moffitt,* 153 Cal. 359, 360. (Italics ours.)

And finally it quoted with approval from McKay on Community Property, as follows:

"The use of the term 'marital partnership' as a synonym for the Spanish community between husband and wife in the matrimonial gains suggests many false analogies, especially to lawyers trained in the learning of the common law, and the original Spanish idea has in some instances suffered at their hands. The community is not a partnership; it is lacking in nearly all the attributes of a partnership; there is a sort of a community of interests in the matrimonial gains, but even this interest has no likeness to a partnership interest, and the powers of the spouses are totally different from those of partners. * * *

"The words 'community property' suggest the idea of a common ownership, but this suggestion, too, is false, though it has been adopted in Texas and Washington. According to the Spanish law, community property is such as the spouses share together on a *dissolution of* the marriage, not such as they *own* together *during* marriage." After considering what the respective rights of the parties in the community property are under the Spanish law, the same author says (sec. 10, p. 44): "Now if the wife has no present right to a given thing, but is limited to a *share* of the common fund on the dissolution of the marital partnership, it is clear that the wife does not hold what we call the legal title, to any given article of the community property, and it follows that the full legal title is in the husband; her right is to share in the surplus of the matri-

> monial gains after paying the debts chargeable against it," that (sec. 287, p. 349) "From the best evidence obtainable it seems reasonably certain that under the Spanish law the husband, during the marriage, held the full proprietary right in common property and that the wife had no actual proprietary right whatever," and that (sec. 11, p. 44) "California, Louisiana, and New Mexico have adhered to the Spanish doctrine that until the dissolution of the community the wife has no *proprietary* right, while Texas and Washington have adopted the doctrine that the spouses during marriage have an equal proprietary right."

In *Rice* v. *McCarthy*, 239 Pac. 56 (July, 1925), in considering the effect of § 172a, Civil Code, enacted in 1917, requiring the wife's signature to a conveyance, the court said (p. 57):

> Prior to the adoption of this section it was the established doctrine in this state that during the marriage the husband is the sole and exclusive owner of all community property, and that the wife has no claim thereto nor any interest or estate therein other than a mere expectancy as heir if she survive him. *Spreckels* v. *Spreckels*, 172 Cal. 775, 158 P. 537, and cases there cited. Whether this doctrine has suffered any modification by reason of the adoption of section 172a is a question which was purposely left open in *Roberts* v. *Wehmeyer*, 191 Cal. 601, 218 P. 22, the court there saying that, because the property in that case was acquired before the

section was adopted, "it is unnecessary to consider the question * * * whether, with reference to after-acquired property, the section creates an estate in the wife which she had not theretofore possessed." Nor do we find it necessary here to consider that question, for both parties to this appeal have expressly conceded that it is the power of alienation, and not the nature of the estate, which is affected by the statute. Therefore, for the purposes of this appeal, we shall adopt counsel's concession as embodying a correct statement of the law.

In *McMullin* v. *Lyon Fireproof Storage Co.* (July, 1925), 239 Pac. 422, the court held, where a husband in California had deposited community property in a warehouse, that a delivery by the warehouseman to the wife was without authority and rendered the warehouseman liable to the husband for conversion.

V

Disregarding descriptive phrases and terminology, the California decisions have never yielded to the wife any semblance of a proprietary interest in the community property prior to the dissolution of the community

This branch of the discussion is the one which should be productive of definite knowledge as to the intrinsic nature of the wife's alleged interest in the community income in California. Here, terminology and adjectives are unimportant. An

effort will be made to ascertain whether the wife has an ownership in the community income in California by determining whether she can exercise any of the ordinary rights of ownership. In so far as this case involves income from property we are dealing, of course, with the system existing in 1918, applicable to property acquired prior to 1917.

a. Management, possession, and control

During the existence of the community, the husband has the right to complete dominion, possession and control of the community property, and so long as the community exists the wife may not exercise any dominion or control over it.

Sec. 172, Civil Code of California.
Vol. 5, California Jurisprudence, page 335, sec. 27, and cases cited.

b. The entire community property is at all times liable for the husband's debts, both those created before his marriage and his separate debts created after marriage

In this respect there is no difference between his separate estate and the community estate, and there is not a suggestion in the California cases that there need be any marshalling of assets between his separate estate and the community estate, and it is clear that the wife has no right to require that the husband's separate debts be paid first out of his separate estate and any creditor of the husband has equal access to both the community and his separate estate.

Meyer v. *Kinzer,* 12 Cal. 247.
Van Maren v. *Johnson,* 15 Cal. 308.

Schuyler v. *Broughton,* 70 Cal. 282.
Spreckels v. *Spreckels,* 116 Cal. 339.
Davis v. *Green,* 122 Cal. 364.

c. The husband may spend the community property and the community income as he pleases. He may not give away the personal property forming part of the community property, but he may spend it on himself

This follows from the statute (Sec. 172, Civil Code) providing that the husband has "like absolute power of disposition other than testamentary, as he has of his separate estate."

> The community property may be lost in visionary schemes or in mere whims. Within the law he may live his life although the community estate is dissipated. (*Spreckels* v. *Spreckels,* 116 Cal. 339, 345.)

The restriction against gifts did not restrict his right to perform other acts of ownership.

In *Garrozi* v. *Dastas,* 204 U. S. 64, a case arising in Porto Rico, it appeared that the husband had taken a trip to Europe and spent extravagant sums, and in the liquidation of the community the wife questioned these expenditures on the ground that they were unreasonable and extravagant. It was held that she had no right to question any expenditure that he had made.

d. The only restriction on the husband's complete dominion and right of disposition is that he may not give away community property.

By sections 172, 172a, *Civil Code,* in 1917 an additional restriction was imposed, requiring the wife to join in a conveyance of community real estate, but that does not apply to the property involved in

this case, all acquired prior to 1917. *Roberts* v. *Wehmeyer, supra.*

While these are restrictions on the power of disposition by the husband they do not operate to vest any interest in the wife. In *Spreckels* v. *Spreckels,* 172 Cal. 775 (1916), in speaking of the restriction on gifts, the court said (p. 782):

> We have been able to find but two decisions of this court upon this subject involving community property which vested after the year 1891, namely, *Fulkerson* v. *Stiles,* 156 Cal. 704, 26 L. R. A. (N. S.) 181, 105 Pac. 966, and *Fanning* v. *Green,* 156 Cal. 281, 104 Pac. 308. In each of these cases the doctrine above stated, that the wife has no interest or estate in community property during the marriage relation, and that the husband is the absolute owner thereof, subject to the limitations upon his power of disposition, is reiterated.
>
> We are satisfied that the proviso of 1891 does not render a gift of community property by the husband without the consent of the wife void as to him, nor confer upon him, in his lifetime, or upon his personal representatives after his death, any right or power to revoke the gift or recover the property. There is nothing in the language to express the idea that the title does not, as before, remain wholly in him. The provision is merely for a limitation upon his power to dispose of it. He is bound by his own gift as fully as if it was of his separate estate. The demurrer was properly sustained so far

as the executors of the will of Claus Spreckels are concerned.

Neither does the proviso purport to vest in the wife, during the marriage, any present interest or estate in the community property given away by the husband without her written consent. In view of the long settled doctrine that the entire estate therein is in the husband during the marriage relation, a doctrine that had become a fixed and well understood rule of property, it is not to be supposed that the legislature would have made a change of so radical a character without plain language to that effect. (Italics ours.)

e. The wife has during the community no right to have her alleged share of the community estate expended for her benefit

By Sections 155 and 174 of the Civil Code of California the wife is given a right to reasonable maintenance and support:

> SEC. 155. *Mutual obligations of husband and wife.*—Husband and wife contract towards each other obligations of mutual respect, fidelity, and support. (Enacted March 21, 1872.)
>
> SEC. 174. *Support of wife.*—If the husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband. (Enacted March 21, 1872.)

But this right is not based on the theory that one-half of the community estate belongs to her. It is an obligation on the husband arising out of the marriage relation and exists without regard to whether there is any community property, and the obligation, when enforced, is satisfied indiscriminately out of his separate estate and his community estate. It has been expressly held in one recent case that a finding that there was some community property is not necessary to sustain a judgment in a suit by the wife for maintenance.

Sheppard v. *Sheppard,* 15 Cal. App. 614, 115 Pac. 751.

Whittle v. *Whittle,* 5 Cal. App. 696, 91 Pac. 171.

St. Vincent's Inst. v. *Davis,* 129 Cal. 17.

Nissen v. *Bendixsen,* 69 Cal. 521.

Shebley v. *Peters,* 53 Cal. App. 288, 200 Pac. 364.

Brezzo v. *Brangero,* 51 Cal. App. 79, 196 Pac. 87.

Davis v. *Davis,* 65 Cal. App. 499, 224 Pac. 478.

f. The wife may not maintain any action during the existence of the community with respect to the community property, and she is not even a proper party to a suit involving the community property

Greiner v. *Greiner,* 58 Cal. 115.

Spreckels v. *Spreckels,* 116 Cal. 339.

5 Cal. Jurisprudence, p. 337 and cases cited.

Mott v. *Smith,* 16 Cal. 533.

Barrett v. *Tewksbury,* 18 Cal. 334.

In *Chance* v. *Kobsted* (1924) 226 Pac. 632, the District Court of Appeals in California considered a case where the husband had deserted the wife and absconded. Before disappearing, he turned over some of the community personal property to another woman, who had disposed of it to the defendant. The wife brought a suit to prevent the dissipation of this community property. No divorce had been granted. It was held that she had no such interest in the community property as to entitle her to maintain the suit. The court said (p. 633):

> The plaintiff's interest in the community property involved here was a mere expectancy and not a title or interest. *Spreckels v. Spreckels,* 116 Cal. 339; *Roberts* v. *Wehmeyer,* 218 Pac. 22. Her husband had complete control over the same, with the exception noted in section 172, Civil Code. * * * The wife's interest in the community property could only become vested and severable upon a dissolution of the community, and there was no dissolution of the community between the husband and wife in this case, and no order of the court in the divorce proceedings dividing the community property, so far as the record shows. Until such dissolution, either by divorce or the death of one spouse, the wife's interest was an inchoate one and not such as to form the basis for an action to quiet title to the property. Even divorce proceedings pending do not, in themselves, interrupt the hus-

band's powers with respect to the management and control of community property, as the effect of such proceedings is not to take the property into the custody of the court. The husband continues to have control of it, and full power to dispose of it. *Lord* v. *Hough,* 43 Cal. 581, 585.

g. On dissolution of the community by the death of the wife, she has no right of testamentary disposition of any part of the community estate

Her inchoate interest subsides and the ownership remains in her husband. It does not form part of her estate and is not subject to administration as such, nor to the payment of her debts or the expenses of administration. (The Act of 1923 giving the wife some power of testamentary disposition does not affect the nature of her interest in the 1918 income here involved.)

Section 1401, Civil Code, before the amendment of 1923 provided that:

> Upon the death of the wife, the entire community property, *without administration,* belongs to the surviving husband * * *.

He did not take by succession or descent, but held as owner, as if his wife had never existed. On the wife's prior death, she left no estate in the community property.

In re Rowland, 74 Cal. 523.
In re Burdick, 112 Cal. 387.

Section 1401, dealing with the prior death of the wife, states that the property "*belongs to*" the hus-

band. Section 1402, dealing with the prior death of the husband, says that one-half of the community "*goes to*" the wife. This significant choice of words points to an intentional distinction.

h. If the husband dies first, the wife succeeds to one-half of what then remains of the community property after paying the husband's debts, including debts incurred by him before marriage and debts incurred in connection with his separate estate, and expenses of administration

The entire community property forms part of his estate, is administered as such, is distributed by decree of the court as such, and her acquisition is nothing more than a succession under a rule of descent. The interest to which the wife succeeds on the death of the husband is of a nature which renders it subject to an inheritance tax. *In re Moffitt's Estate*, 153 Cal. 359. The statute of 1917, providing that the wife's interest should not be subjected to an inheritance tax was a mere exemption statute, not changing the quality or nature of her interest. This will be discussed further in connection with the decision in *Wardell* v. *Blum*.

Section 1402, Civil Code (prior to 1923), provided that—

> Upon the death of the husband, one-half of the community property goes to the surviving wife * * *. In case of dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowances, and the charges and expenses of administration.

The widow takes as heir and by succession.

In re Burdick, 112 Cal. 387.
Sharp v. *Loupe*, 120 Cal. 89.
Cunha v. *Hughes*, 122 Cal. 111.
In re Moffitt, 153 Cal. 359.
Moffitt v. *Kelly*, 218 U. S. 400.

i. Restrictions on gifts

The restriction does not operate to vest any interest in the wife. *Spreckels* v. *Spreckels*, 172 Cal. 775. (See quotation from this case on p. 48.)

Since the amendment to the community property laws of 1891, restricting the husband's power of disposition by prohibiting a gift of the community property without his wife's consent, there has been some discussion in the decided cases on the question whether prior to the dissolution of the community by death or divorce the wife could maintain an action to set aside a gift. This question has never been decided. *Spreckels* v. *Spreckels*, 172 Cal. 775; *Dargie* v. *Patterson*, 176 Cal. 714, 718; *Winchester* v. *Winchester*, 175 Cal. 391.

In *Greiner* v. *Greiner*, 58 Cal. 115, it was held that the wife could not before divorce bring an action to set aside a conveyance of community property made by the husband for the purpose of defrauding her. The court said (p. 119):

> If the transfer has been made to defraud the community, on the dissolution of the marriage, the wife can bring her action to vacate it. We do not see that she can bring any action to set aside any transfer made by

the husband while the marriage bond exists. Until this is dissolved, according to the rule as laid down in *Van Maren* v. *Johnson,* above cited, she has no interest in the common property which entitles her to sue.

This decision was approved and adhered to in *Cummings* v. *Cummings,* 2 Cal. Unrep. 774, 14 Pac. 562.

k. On dissolution of the community by divorce the community property is distributed by decree of the divorce court, and in the absence of adultery or cruel or inhuman treatment is divided equally

Where adultery or cruel or inhuman treatment has occurred, the division is in the discretion of the court:

> SEC. 146. *Disposition of community property on divorce.*—In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows:
>
> One. If the decree be rendered on the ground of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case and the condition of the parties, may deem just.
>
> Two. If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties.
>
> Three. If a homestead has been selected from the community property, it may be assigned to the innocent party, either abso-

lutely or for a limited period, subject, in the latter case, to the future disposition of the court; or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

Four. If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party.

Gould v. *Gould*, 63 Cal. App. 172, 218 Pac. 278.

Dissolution of the community by divorce without any decree dividing the property results in the wife becoming owner of one-half. *Taylor* v. *Taylor*, 192 Cal. 71.

l. Liability of the community estate for the wife's debts

The community estate is liable for the debts of the wife contracted prior to the marriage. This liability seems to be based on the common law rule that on marriage the husband became liable for all the debts of his wife contracted *dum sola*; and in California a statute having exempted his separate estate from liability for debts of the wife contracted before marriage leaves only the community estate so subject. *Van Maren* v. *Johnson*, 15 Cal. 308.

It will be noted, however, that the liability of the community estate for the debts of the wife contracted prior to the marriage is not limited to half of the community property, and such debts

may be satisfied indiscriminately out of any part of the community estate, thus completely negativing the idea that the use of the community estate to discharge such debts is based on the conception of ownership by her of half of the community property. As to debts of the wife contracted subsequent to marriage, the community estate is not liable.

SEC. 167, Civil Code.
Schuyler v. *Broughton*, 70 Cal. 282.
Svetinich v. *Sheean*, 124 Cal. 216.

The freedom of the community estate from the debts of the wife arising after marriage is such that her individual liability for an income tax may not be satisfied out of it, with the ridiculous result that she has not a sufficient interest or ownership in the community property, one-half the income of which she would return as her own for Federal income tax purposes, to enable the United States to collect the tax out of the community property in which she claims an interest, as against the objection of the husband. It is equally clear that if an Act of Congress attempted to require a wife in California to return and pay a tax on one-half of the community income, she could successfully resist on the ground that the United States may not make one person liable for an income tax on another person's income.

Whatever adjectives are used to describe the wife's interest in the community estate in California, this dissection of the character of her in-

terest shows that prior to the dissolution of the community the income from the community property belongs to the husband and the wife has no real ownership or proprietary right in it. She can not control it or possess it; she can not spend it; she has no right to have it spent upon her; her husband may spend it as he pleases on riotous living; it is not liable for the wife's debts. If any obligation rests on the husband for support, it is a personal obligation, to be satisfied out of his separate estate as well as the community, and the wife has no such interest in the community property as would enable the United States to satisfy a claim against her for income tax out of the community. If the United States by statute should attempt to compel the wives of California to return as their own a share in the community income under this system, and attempt to render the wives personally liable for an income tax on that share, its validity would have to be denied on the ground that the wife has no real interest in the income and she can not be rendered personally liable for the income tax on her husband's income.

VI

The decisions in Blum v. Wardell, if not distinguished, must be disapproved

In *Blum* v. *Wardell,* 270 Fed. 309, and *Wardell* v. *Blum,* 276 Fed. 226, the District Court of the United States for the Northern District of California and the Circuit Court of Appeals for the Ninth

Circuit, held that the share of the community estate to which the wife in California succeeded on the death of her husband was not subject to the Federal estate tax. This Court denied a writ of certiorari in that case. It is only necessary to say here that the denial of the writ does not, under the statutes or rules of the court, have the effect of a decision of this court that the decision in *Wardell* v. *Blum* was right. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251.

The *Blum case* dealt with the nature of the right of succession by the wife to a share of what remained of the community estate on the dissolution of the community by death of the husband. In the present case we are interested in the question whether during the existence of the community the wife has such an interest in the community income as to be considered the owner of the income for income tax purposes.

In *Blum* v. *Wardell* the court proceeded on the theory that the Act of 1917, requiring the wife's signature to a conveyance of real estate, applied to community property previously acquired (270 Fed. 314; 276 Fed. 227), and no question was raised as to whether the Blum estate (he died in 1918) included property acquired before 1917.

Since then the Supreme Court of California, in *Roberts* v. *Wehmeyer,* has held that the Act of 1917 did not apply to community property previously acquired, and in the case at bar *all of the community property from which the income* (other than

salaries, etc.) *was derived was acquired prior to 1917, and the extent of the wife's interest is not affected or enlarged by the Act of 1917.*

If this does not present sufficient ground for distinguishing the two cases, we are able to demonstrate, to our own satisfaction at least, that the decision in the case of *Wardell* v. *Blum* was erroneous and based on an erroneous conception of the nature and legal effect of the statute of California enacted in 1917 exempting the interest to which the wife succeeded on the death of her husband from the operation of the California Inheritance Tax Law.

District Judge Rudkin, in his opinion in the District Court, discussing the California statutes and decisions, reached the conclusion that prior to the enactment of certain amendments to the California statutes on the subject the wife had no estate, legal or equitable, in the community property during the life of the husband, saying (270 Fed. at p. 312):

> From these decisions it becomes at once apparent that, prior to the enactment of the legislation upon which the plaintiffs rely, the wife had no estate, legal or equitable, in the community property during the life of the husband, that her interest was a mere expectancy, and that she took as heir to her husband, and not otherwise.

Thereupon he proceeded to consider the amendments to the community property law enacted in 1891, 1901, and 1917, forbidding a husband to make

a gift of the community property without the consent of his wife, forbidding him from disposing of the household furniture and the clothing and wearing apparel of his wife and minor children without the consent of the wife, and forbidding the conveyance of real estate unless his wife joined in the deed, together with the Act of 1917, exempting the wife's interest from the operation of the Inheritance Tax Law. The Court concluded that these amendments operated to change the nature of the wife's interest, and to give her a present interest and ownership during the existence of the community of a vested nature, so that on the death of her husband she took by right of survivorship and not by inheritance. If any weight was given by the District Court to those amendments enacted *prior to 1917*, it may be said that the Supreme Court of California has definitely held that these restrictions on the husband's right of disposition did not change the nature of the wife's interest nor give her any ownership or proprietary interest; and the Court has reiterated that in *Roberts* v. *Wehmeyer*, 191 Cal. 601, decided *after* the case of *Blum* v. *Wardell*.

The controlling factor in the decision of Judge Rudkin in the District Court, and in the majority opinion in the Circuit Court of Appeals, seems to have been the Act of 1917 (Statutes of 1917, page 880). An Inheritance Tax Law had been in effect in California since 1905, and under it the interest

in the community estate to which the wife succeeded on the husband's death was subjected to an inheritance tax, on the ground that she took as an heir and had no vested interest prior to her husband's death. *In re Moffitt's Estate* (1908) 153 Cal. 359; *Estate of Rossi,* 169 Cal. 148; *Chambers* v. *Lamb,* 186 Cal. 261. The Act of 1917, amending the inheritance tax law, contained the following provisions (p. 881):

> * * * that *for the purpose of this act* the one half of the community property which goes to the surviving wife on the death of the husband * * * shall not be deemed to pass to her as heir to her husband, but shall, *for the purpose of this act,* be deemed to go, pass, * * * and her said one half of the community *shall not be subject to the provisions of this act;* provided, further, that in case of a transfer of community property from the husband to the wife, * * * one half of the community property so transferred *shall not be subject to the provisions of this act;* and provided, further, that the presumption that property acquired by either husband or wife after marriage is community property, shall not obtain *for the purpose of this act* as against any claim by the State for the tax hereby imposed; * * *. (Italics ours.)

In *Wardell* v. *Blum,* both courts treated that statute as changing the intrinsic nature of the wife's interest in the community estate. In the

Court of Appeals decision it is said (276 Fed. 226, 227):

> But in 1917 (Stat. 1917, p. 880) the Legislature of California so changed its inheritance tax law as to expressly declare that for the purposes of the act the half of the community property which goes to the widow on the death of the husband shall " not " be deemed to pass to her as " heir " of her husband, but shall go to her as for a valuable and adequate consideration, and shall not be subject to the inheritance law of the State.
>
> That manifestly is a clear statutory declaration that the wife's half of the community property is not part of the property of the deceased husband, at least so far as the state inheritance taxes are concerned.

The Court of Appeals rested its decision in the *Blum case* on the effect of the Act of 1917, exempting the wife's interest from the State inheritance tax.

The fallacy of these conclusions as to the nature of the Act of 1917 seems self-evident. After the passage of that statute the wife's interest in the community property was just as it was before. No change was effected in her right of dominion or control or in the husband's right of disposition or control, and the wife had no greater right to exercise an attribute of ownership than she had before the passage of the Act of 1917. That Act did not change the essential nature of her interest, did not convert an interest which was a proper subject for

an inheritance tax to one which was not. The only effect of the statute was to *exempt* from payment of the tax an interest of an essential nature properly subject to an inheritance tax. If prior to the passsage of the Act of 1917 the nature of the wife's right and succession was such as to enable the State to levy an inheritance tax on the succession, that power still exists;and by another statute to-morrow, making no change of the respective rights of the husband and wife in the community property, the wife's succession could again be subjected to an inheritance tax in California.

If an additional ground is needed for the view that the inheritance tax act of 1917 did not change the nature of the wife's interest in the community estate, it will be found in the Constitution of California, which provides, in Art. IV:

> Sec. 24. Every act shall embrace but one subject, which shall be embraced in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title.

The title of the Act of 1917 relieving the wife's succession from inheritance tax is:

> An act to establish a tax on gifts, legacies, inheritances, bequests, devices, successions and transfers, to provide for its collection and to direct the disposition of its proceeds, etc. Chapter 589, Laws of 1917.

There is not a word in the title indicating a change in the nature of the wife's interest in the community.

If the body of the act had attempted such a change the provision would have been void.

The provisos to the effect that the wife's interest shall be free from the tax is a legislative recognition of the fact that the nature of her interest was such as to subject it to an inheritance tax unless expressly exempted.

To say, therefore, that the Act of 1917 operated to prevent the imposition of a Federal Estate tax on the transfer of the wife's interest is equivalent to holding that if a State exempts from an inheritance tax an interest of a nature essentially subject to such a tax the exemption by the State operates to make the succession immune from a Federal Tax. Prior to the California Act of 1917, exempting the wife's succession from the State inheritance tax, the courts of California had held that the nature of the succession was such as to make it subject to the inheritance tax. They had held that the wife had no interest or ownership prior to the dissolution of the community, and that the interest which she succeeded to on the prior death of her husband came to her by inheritance, and not by virtue of prior ownership. Admittedly, if the succession was such as to subject it to a State inheritance tax, that fact made the transfer of such a nature as to be subject to a Federal estate tax; and as the California legislature has not made any change by the 1917 Act in

the nature of the wife's interest, the succession is still subject to a Federal estate tax.

The Act of 1917 was not a " repudiation " of the decision of the California court in the *Moffitt case*. *The Moffitt* case was decided in 1908, and long before that the court had held that the wife took as heir.

Sharp v. *Loupe,* 120 Cal. 89.
In re Burdick, 112 Cal. 387 (1896).

The passage in 1905 of the inheritance tax law of California must have been with the legislative understanding that the wife's interest, by previous decisions of the courts, was of a nature such as to be subject to the tax.

The rule thus announced in the *Moffitt case* stood for nine years. The Act of 1917 exempting the wife's interest from the tax was no more a legislative disapproval of the *soundness* of the decisions of the courts than is any other statutory change in existing law.

The dissenting opinion of Judge Hunt in *Wardell* v. *Blum,* 276 Fed. at page 233, calls attention to the decision in *Badover* v. *Guaranty Trust & Savings Bank,* 186 Cal. 775, 200 Pac. 638. The case shows the law prior to the 1917 amendments, and Judge Hunt in *Wardell* v. *Blum* contends that those amendments did not change the law.

In the *Badover case* it was decided that the wife could be a witness in a case involving community property. The court said (p. 781):

We are further of opinion that, in view of the well-settled doctrine in this state with relation to the status of community property, a doctrine, as said in *Spreckels* v. *Spreckels,* 172 Cal. 775, 782, 158 Pac. 537, 539, "that had become a fixed and well-understood rule of property," it must be held that the wife, *during the marriage, has no existing property right in the community property.* She may enforce certain limitations established by statute on the husband's control thereof, but this gives her no present interest in the property, or as put in *Estate of Burdick,* 112 Cal. 387, 393, 44 Pac. 734, 735, "no right or title of any kind in any specific property."

VII

Amendments to the California statutes enacted in 1917 and later are not pertinent here

One of the amendments adopted in 1917 was that which exempted the share of the community property to which the wife succeeded on her husband's death from the California inheritance tax. It has been shown in the previous discussion that this statute did not change the nature of the wife's interest. The other amendment of 1917 was that quoted on page 17 (sec. 172a), requiring that the wife must join with the husband in executing a conveyance of community real estate.

This latter provision does not apply to real estate acquired prior to its passage, nor to real estate acquired after its passage with community prop-

erty acquired before 1917. *Roberts* v. *Wehmeyer, supra.*

In this case part of the income involved was derived from salaries and commissions earned by the husband in 1918. The other income was derived from rents and issues of real and personal property, "all of which had been acquired by said community before the year 1917." (R. 15.) Such of the income involved in this case as was derived from real estate represented income from real estate free from the restrictive provisions of the Act of 1917, and the extent of the wife's interest in it and in personal property derived as income from it was not affected by the Act of 1917. Furthermore, the Act of 1917 requiring a wife to join in conveyances of community *real estate* did not make the wife the owner or proprietor of community *personal property* derived as income from that real estate.

In the second *Spreckels case,* the California court held that a prior Act forbidding the husband to make gifts of community property without the consent of his wife did not operate to vest any ownership in the wife, although the restriction could not apply to property acquired before its passage. By the same reasoning, the Act of 1917, requiring that the wife join in conveyances of real estate, while operating as a restriction on the husband's powers, vested no interest in the wife.

Certainly, even though by virtue of that statute the wife acquired some sort of ownership in the real

estate, she was not given any greater interest in the personal property derived as income from such real estate than she had previously held in any community personal property. Personal property derived as income from such real estate in 1918 was still subject to the complete right of disposition of the husband as personalty in accordance with the law as it stood prior to 1917 and was in 1918 with respect to all community personal property in California.

The Act of 1923, giving the wife a testamentary disposition over some of the community property, has no relevancy here.

VIII

Opinions of the Attorneys General and miscellaneous authorities

a. The opinion of February 26, 1921 (32 Ops. A. G. 435), held that in California the wife has no such interest in the community income as to entitle her to make a separate return for the purposes of Federal income tax

That opinion has never been withdrawn.

In the last opinion, rendered October 9, 1924 (34 Ops. A. G. 395), Attorney General Stone said, with respect to the California situation:

> I express no opinion with respect to the principles which govern the taxation of income derived from community property.

If between the opinion of March 8, 1924 (which followed *Wardell* v. *Blum* and held that the Federal estate tax was not applicable to the share of the community property in California to which

the wife succeeded on her husband's death), and the previous opinion of February 26, 1921 (holding that the income of community property in California is taxable to the husband alone), there is a conflict, it is sufficient here to say that we consider the opinion of February 26, 1921, sound in so far as it deals with the California situation.

b. Congressional action

References which may be made to the failure of Congress to adopt amendments to the income-tax law providing for taxing of community income to the husband are inconclusive. At the time Congress dropped such amendments from consideration, the Government was then requiring the husband to pay a tax on all community income in California under rulings of the Treasury Department and the Attorney General, and if any inferences are to be drawn from nonaction of Congress as to the income-tax question in California, it is that Congress was satisfied with the practice then followed.

c. In the Philippine Islands the income of the community is taxed as a unit to the husband under the revenue laws of the United States

The Supreme Court of the Philippine Islands considered this question in *Madrigal and Paterno* v. *Rafferty* (1918) 38 Phil. 414. In that case the husband paid a tax on the total of earnings by him and earnings made by his wife in another enterprise, and brought action for refund. The Supreme Court of the Islands decided that the wife has an

inchoate right in the property of her husband during the life of the conjugal partnership, but that she has no absolute right to one-half of the income of the conjugal partnership. The Attorney General of the Islands had decided that the husband need only pay on one-half of the community income. The Treasury Department decided otherwise, and the lower court and Supreme Court of the Islands sustained the decision of the Treasury Department. The Court said (p. 420):

> With these general observations relative to the Income Tax Law in force in the Philippine Islands, we turn for a moment to consider the provisions of the Civil Code dealing with the conjugal partnership. Recently in two elaborate decisions in which a long line of Spanish authorities were cited, this court, in speaking of the conjugal partnership, decided that " prior to the liquidation, the interest of the wife, and in case of her death, of her heirs, is an interest inchoate, a mere expectancy, which constitutes neither a legal nor an equitable estate, and does not ripen into title until there appears that there are assets in the community as a result of the liquidation and settlement." (*Nable Jose* v. *Nable Jose* (1916) 15 Off. Gaz. 871; *Manuel and Laxamana* v. *Losano* (1918) 16 Off. Gaz. 1265.)
>
> Susana Paterno, wife of Vicente Madrigal, has an inchoate right in the property of her husband, Vicente Madrigal, during the life of the conjugal partnership. She has

an interest in the ultimate property rights and in the ultimate ownership of property acquired as income after such income has become capital. Susana Paterno has no absolute right to one-half of the income of the conjugal partnership. Not being seized of a separate estate, Susana Paterno cannot make a separate return in order to receive the benefit of the exemption which would arise by reason of the additional tax. As she has no estate and income, actually and legally vested in her and entirely distinct from her husband's property, the income cannot properly be considered the separate income of the wife for the purposes of the additional tax.

d. Decisions in the Supreme Court of the United States

In *Warburton* v. *White,* 176 U. S. 484, the court dealt with the Washington system. The question was whether a statute enacted in 1879, providing that on the death of the wife her share in the community property should pass to her heirs, deprived her husband of property rights without due process of law, and this involved in inquiry into the nature of the husband's and wife's interest in the community property in the State of Washington. The Court held that the Act of 1879 was valid, because prior to its passage the wife had a subsisting interest in the community estate, and that the husband was deprived of no property interest by the passage of the Act.

This case deals with the community property system in the State of Washington and not with that in California. The opinion discloses radical differences between the statutes and decisions of Washington and California.

McKay on Community Property distinguishes the systems of Washington and Texas from that in California, and says that, in contrast to the California system, Texas and Washington "have adopted the doctrine that the spouses during marriage have an equal proprietary right." (Sec. XI, p. 44.)

In *Garrozi* v. *Dastas* (1907) 204 U. S. 64, the Court considered a case arising in Porto Rico. The Court had under consideration the rights of a wife in the community property after dissolution of the community by divorce. In liquidating the community property the wife sought to hold the husband to account for extravagant expenditures made by him out of the community property. The district court had found (204 U. S. at p. 70) that during the marriage the husband had spent, out of the revenues of his property, which revenues fell into the community, the sum of $47,000, during various trips made by him to Europe, and that these expenditures by the husband, from revenue which belonged to the community, were unreasonable to the extent of $22,000. From the facts thus found, as a matter of law, the district court concluded that the $22,000 should be treated as an existing acquet of the community, subject to be equally divided be-

tween the parties. This Court decided that under the community property system in Porto Rico, during the existence of the community the husband could spend the community property for his own pleasure in extravagant and wasteful trips without infringing any right of the wife.

The subject is discussed very fully on pages 78–82. In view of the recent amendments to the California Code one passage on page 82 is especially pertinent:

> True it is that in the Porto Rican Code of 1902 there was inserted a provision, previously commented on (section 1328), limiting the power of the husband to dispose of the immovable property of the community without the consent of the wife. But this express limitation as to one particular class of property, by inverse reasoning, is a reaffirmance of the power of the husband as head and master of the community in all other respects.

In *Moffitt* v. *Kelly,* 218 U. S. 400, this Court held that the nature of the wife's interest in community property in California was a local question, that this Court would not review the determination of the Supreme Court of California that the wife had no property interest in community property, that she succeeded as heir to a share on the husband's death, and that her share was subject to a State inheritance tax. The Court said that such taxation did not take the wife's property without due process of law, because the State courts held she had no property interest in the community.

In *Arnett* v. *Reade,* 220 U. S. 311, the Court reviewed a decision of the Supreme Court of the Territory of New Mexico. A husband had made a conveyance of community real estate without the wife joining in the conveyance, contrary to a statute of New Mexico enacted in 1901, providing that "neither husband nor wife shall convey, mortgage, incumber, or dispose of any real estate or legal or equitable interest therein acquired during coverture by onerous title unless both join in the execution thereof." The land involved was acquired prior to the statute of 1901, and the Court held that the statute applied to land acquired prior to its passage, and that the statute so construed was valid against the claim of the husband's grantee that it operated to divest the husband of an interest in his own real estate without due process of law, the basis for the decision being that the wife had, prior to the passage of the statute, some interest in the community real estate.

This case deals with the community system in New Mexico, not that in California. It discloses radical differences between the community property system in New Mexico and that in California; and the California Supreme Court, in *Roberts* v. *Wehmeyer,* has expressly said that the decision in *Arnett* v. *Reade* does not describe the community system of California and is of no authority in that State as a guide to the extent or nature of the wife's interest.

e. The opinions of text writers

We have already quoted largely from McKay on Community Property. It is undoubtedly his view that in California the wife has no proprietary interest in the community property. He points out the extent to which the community property systems in various States differ from each other.

Professor John Norton Pomeroy, who has been described by a member of this Court as " a serious and original thinker " (Great American Lawyers, Vol. VIII, p. 108), while professor in the Hastings Law College of the University of California, in an article in the West Coast Reporter, Vol. 4, page 390, on the California system (as it existed prior to the amendment restricting gifts by the husband), said:

> In the early case of *Beard* v. *Knox* (5 Cal. 252) the court held that, from other statutory provisions, especially those defining the wife's fixed interest and share on her husband's death, the power of testamentary disposition by the husband was impliedly excepted, and his " absolute power of disposition " was necessarily limited to a disposal during their joint lives, thus making the rule exactly the same as it is under the code. In the course of his opinion, Murray, C. J., after some remarks as to the general intent of the community property as a protection for the wife after the husband's death, says: " The husband and wife during the coverture are *jointly seized* of the property, with a half interest remaining over to the wife, sub-

ject only to the husband's disposal during their joint lives. This is a *present, definite, and certain interest,* which becomes absolute at his death, * * * and the widow becomes seized of one-half of the property." This whole remark was a mere dictum, entirely unnecessary for the decision of the case; but it would be difficult to include more incorrect conceptions and statements in a shorter sentence.

* * * * *

And when we remember that the wife's interest in the entire community property or in any portion of it may be completely cut off, by a disposition made by her husband during the marriage, that she has no right to control, manage, or possess it, that she can not make it liable for her debts nor contracts, and that she is completely without any power to sell, convey, transfer, or otherwise dispose of it, we must plainly see that it is a misuse or perversion of words to say that her interest in the community property during the marriage is "*a present, certain, and definite interest,* which becomes absolute at his death." Even at his death the community property is primarily and mainly liable for his debts before her right attaches as a fixed, certain, and definite share.

In the latter case of *Van Maren* v. *Johnson* (15 Cal. 308), Mr. Justice Field described the real nature of the ownership of the community property, and of the interest held by each spouse, during the marriage, with perfect accuracy. He said: "*The title*

to the community property vests in the husband. He can dispose of the same absolutely [i. e., by a transfer *inter vivos*] as if it were his own separate property. *The interest of the wife is a mere expectancy,* like the interest which an heir may possess in the property of his living ancestor. *Guice* v. *Lawrence.*" (2 La. An. 226.) This language describes the ownership of the community property during the marriage, under our law, with perfect accuracy.

* * * * *

It can not be said, therefore, with any truth, that during the marriage the wife has any interest or the slightest degree of ownership in the community property; indeed her right is less definite and more precarious than the wife's incohate dower right at the common law. It would seem, in fact, that the term itself "community" property is somewhat of a misnomer. (West Coast Re-Reporter, Vol. 4, pp. 390–392.)

California Jurisprudence, an encyclopaedia of the law of the State of California is in course of publication by the Bancroft-Whitney Company. Volume 5, published in 1922 (Congressional Library, Class Law, Deck 2), contains an article of 111 pages on the community property system in California, written by O. K. McMurray, for many years of the faculty (now Dean) of the School of Jurisprudence of the University of California, and it gives an excellent picture of the system in that State.

He says (California Jurisprudence, vol. 5, pp. 330–334):

Nor does she under California law acquire any interest in the community property during the marriage. " For convenience, and we think accurately, the community title may be designated as his [the husband's] title, since the estate of the wife in any portion of the community property is but contingent; an estate which never becomes absolute until she ceases to be wife by reason of the dissolution of the community." *McComb* v. *Spangler,* 71 Cal. 418. Under the act of 1850, as well as under the Mexican law, as declared by the courts of California, the estate of the husband in the community property was absolute, while the wife possessed a mere expectancy, like that of an heir; at least, this was the view taken by the California courts from an early day. *Estate of Moffitt,* 153 Cal. 359; *Spreckels* v. *Spreckels,* 172 Cal. 775. The husband is said to be seized of the community property during his lifetime; upon his death the community property is " property of the estate " of the husband. Civil Code, Sec. 1402; Code Civ. Proc., Secs. 1516, 1561, 1562; *Sharp* v. *Loupe,* 120 Cal. 89.

* * * * *

But the courts have abandoned the theory expressed in *Beard* v. *Knox* and other cases, and the interest of the wife has been defined as " a mere expectancy like the interest which an heir may possess in the property of his ancestor." The title is held to be in the husband and in him alone, according to the great weight of authority. [*Scott* v. *Ward,*

13 Cal. 458; *Tryon* v. *Sutton,* 13 Cal. 490, etc., see footnotes pages 332 and 333.] The limitation upon the husband's power of testamentary disposition does not vest in the wife, during the marriage, any interest or estate whatever in the community property. It is merely a restriction upon the husband's absolute power of control and does not affect his title to the community property. *Spreckels* v. *Spreckels,* 172 Cal. 775.

The husband, upon the death of the wife, holds the community property from the moment of her death as though acquired by himself, and does not take the property by succession. *Estate of Warner,* 6 Cal. App. 361. The interest of the surviving wife in the community is, on the other hand, held to be that of an heir. [*Estate of Burdick,* 112 Cal. 387, and other cases cited in footnote on page 334.] A relinquishment by the wife of all claim to the property of her husband "as heir" covers her interest in the community property, since she takes after his death as heir, and it is proper, under the decisions, to speak of the community property as that of the husband. (*Cunha* v. *Hughes,* 122 Cal. 111, *Warner* v. *Warner,* 144 Cal. 618; *Warner* v. *Warner,* 6 Cal. App. 361.)

In an article entitled "The Ownership of Community Property" (35 Harvard Law Review (1921), pages 48–55), Professor Alvin E. Evans, of the Law School of the University of Idaho, says:

As a matter of fact there are four theories regarding the nature of the ownership of community property, and they differ essentially from each other in regard to the nature of the wife's interest. These theories are here called, for convenience, the California or single ownership, the Washington or entity, the Idaho or double ownership, and the Texas or trust theories, respectively.

THE CALIFORNIA OR SINGLE OWNERSHIP THEORY

The California theory is that the husband owns the community property, that the wife has a mere expectancy and not a vested interest, that her interest, whatever it is, is a sort of incumbrance upon the husband's absolute title; that her interest vests only when the husband predeceases her. This view of absolute ownership is regarded by the courts apparently as consistent with the fact that the husband can not alienate in fraud of the wife, nor dispose of more than one-half interest by will, together with other statutory impediments imposed on his absolute ownership.

* * * * *

It results, then, that as the husband " is the absolute owner of the community property the same as he is of his separate property," on death of the wife he does not take anything that he did not have before, i. e., he is not the wife's heir, but rather his interterest is relieved of a sort of incumbrance and on her prior death she leaves no interest subject to administration.

IX

A comparison of the extent of the wife's interest in the community income under the California system with the extent of her interest in his separate income in States where the community system does not prevail is illuminating

McKay, in his work on Community Property says (p. 41):

> The words "community property" suggest an idea of a common ownership, but this suggestion, too, is false, though it has been adopted in Texas and Washington. Accord to the Spanish law, community property is such as the spouses share on a dissolution of a marriage, not such as they own together during marriage.

No better illustration can be given of the want of any real ownership or proprietorship by the wife in the community income in California than by comparing her rights in the community income with the extent of her interest in the separate income of her husband in States where the community system does not prevail.

Some States in the west and northwest, where the community system does not prevail, as a substitute for the common law estates of curtesy and dower, the wife has been given, upon the prior death of her husband, what, for want of a better definition, is called a "statutory" interest in real and personal property belonging to his estate. The parallel between that system in Minnesota, as an example, and the community system in California

as it related to community property acquired, as in this case, prior to 1917 is a deadly one.

Omitting reference to some unimportant exceptions and special provisions, in Minnesota, by statute, upon the death of the husband, the widow is entitled—subject to the payment of the husband's debts and expenses of administration—to one-third of the personal property then belonging to his estate and one-third of all real estate of which he shall have been seized during coverture, the conveyance of which she has not assented to in writing.

In California on the death of the husband the wife takes, subject to the payment of the husband's debts and expenses of administration, one-half of the community real and personal property then remaining. In California, prior to 1917, her inchoate interest in the community real estate was not protected as in Minnesota by requiring her consent to a conveyance. In Minnesota the interest in the husband's estate to which the wife succeeds is administered as part of the husband's estate and distributed by decree of the probate court, and in California the entire community property is likewise administered as part of the husband's estate. In Minnesota the interest to which the widow succeeds is subjected to an inheritance tax. In California, from 1905 until the passage of the 1917 Act exempting it, the widow's succession to one-half the community estate was subjected to an inheritance tax.

In Minnesota, if the wife dies first, her inchoate statutory interest in the husband's separate prop-

erty is extinguished. She leaves no interest to be administered and has no testamentary power over it. In California, likewise, the prior death of the wife extinguishes any interest in the community, and the entire community property, without administration and free from the wife's testamentary disposition, remains the property of the husband. In Minnesota no inheritance tax has ever been imposed on the extinction of the wife's inchoate interest resulting from her death leaving the husband surviving, and in California no such tax has been imposed on the cessation of the wife's interest in the community property.

In Minnesota, the separate estate of the husband is not liable for the wife's debts incurred during coverture, except that by virtue of the marital relation the husband and his separate property may become liable for necessaries furnished the wife, under familiar rules of the common law.

In California, the community property is not liable to the wife's debts contracted after marriage. There is a liability on the husband for reasonable support and maintenance and for necessaries as in Minnesota, but that, as in Minnesota, is not limited to a half interest in or to all of the community, but is chargeable as well against his separate estate.

There are two respects in which the California system differs somewhat from the statutory interest created by the Minnesota law. In Minnesota, the husband may give away his personal property dur-

ing coverture, and his wife has no ground of complaint. In California, the statute forbids him to give away community property without the consent of his wife, but the court has there held that this is a mere restriction on his disposition and vests no interest in the wife.

In Minnesota, on dissolution of the marriage by divorce, the statutes authorize the court to award the wife such part of her statutory one-third interest in his property as may seem just, depending upon the circumstances and the question of fault or misconduct. In California, the statutes give the wife one-half of the community property on divorce except in cases of adultery or cruel treatment, in which case a different disposition or division of the community estate may be made by the court in the divorce proceedings.

General Statutes, Minnesota, 1923, §§8718–8720, §8726, §§8617–8620, §8602, §2293.

Griswold v. *McGee,* 102 Minn. 114.
Stitt v. *Smith,* 102 Minn. 253.
In re Rausch, 35 Minn. 291.
Scott v. *Wells,* 55 Minn. 274.
Hayden v. *Lamberton,* 100 Minn. 384.

With the exception of the slight differences with respect to the power of giving away personalty and the manner of division in case of dissolution of the marital relation by divorce, the systems in California and Minnesota do not differ substantially—that is to say, in Minnesota the wife has as much ownership, dominion, proprietorship and right to

the beneficial use and enjoyment of the separate income of her husband and the income from her husband's separate estate as the wife in California has in and to the so-called community income. Indeed, the Minnesota wife has two considerable advantages, in that her separate earnings belong to her and may be disposed of by her, whereas in California the earnings of the wife—unless she is separated from her husband—form part of the community income and may be managed and controlled by the husband, and in the fact that in Minnesota her statutory interest relates to property owned by her husband at marriage as well as that acquired during coverture.

To suggest that under a system such as prevails in Minnesota and neighboring States the wife has such an interest in the husband's separate income, or in the income of his separate property, as to entitle her to return half of it for Federal income tax purposes as her own would be absurd, and yet, except for a few phrases and some differences in terminology the wife's interest in the community income in California is no more substantial.

CONCLUSION

The great difficulty the California Federal judges seem to have had with this situation is in reconciling themselves to the notion that California, on account of the differences in its system, may be subject to different treatment than the other so-called community States. So far as concerns the question

of discrimination and the uniformity of Federal taxes throughout the United States, it may be said that to permit the wife in California to reduce the surtaxes on what is really her husband's income by returning half of the community income as her own would be the most direct discrimination against husbands and wives in some forty States of the Union, where, in order to split their incomes between husband and wife to avoid high surtaxes, husbands must convey part of their property outright to their wives, paying a gift tax in the process.

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